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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 561

BART LUIS CARITATIVO,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, and FRED R. DICKSON, Warden of the California State Prison at San Quentin,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

On May 8, 1957, the California Supreme Court denied Caritativo's petition for writ of habeas corpus without opinion.

On November 20, 1956, the California Supreme Court granted the State's motion to dismiss Carita-

tivo's appeal from an order denying a petition for a writ of mandate. Petitioner sought a writ of mandate to compel the warden to institute proceedings to determine his present sanity while awaiting execution, after the warden had determined that there was not "good reason to believe" Caritativo was presently insane. That opinion is reported as *Caritativo v. Teets*, 47 Cal.2d 304. This Court denied the petition for writ of certiorari on February 25, 1957. *Caritativo v. California*, 561 Misc., October Term, 1956.

QUESTIONS PRESENTED.

Is the California procedure which provides no judicial review of the warden's determination of a condemned inmate's sanity, constitutional?

Is the California procedural rule which requires the entry of a plea of not guilty by reason of insanity before commencement of trial, constitutional?

STATUTES INVOLVED.

The constitutionality of sections 3700, 3701 and 1016 of the California Penal Code are involved in this proceeding. These sections provide as follows:

> § 3700. No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.

§ 3701. If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry.

§ 1016. There are five kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court:

1. Guilty.

2. Not guilty.

3. A former judgment of conviction or acquittal of the offense charged.

4. Once in jeopardy.

5. Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged.

STATEMENT OF THE CASE.

Petitioner was convicted in the Superior Court of Marin County. The jury found petitioner guilty of murder in the first degree and petitioner was duly sentenced to death. The California Supreme Court on the automatic appeal affirmed the conviction. See *People v. Caritativo,* 46 Cal.2d 68.

Petitioner's execution was set for August 31, 1956. On August 30, 1956, Caritativo, through his counsel, filed a petition for writ of mandate in the Marin County Superior Court, seeking to compel the warden to institute proceedings to determine Caritativo's present insanity. The Superior Court denied the petition on the same date. The following day, August 31, petitioner filed a notice of appeal in the California Supreme Court and sought and obtained a stay of execution pending the appeal. The People filed a motion to dismiss the appeal supported by affidavits and on November 20, 1956, the California Supreme Court granted the motion to dismiss the appeal in an opinion reported as *Caritativo v. Teets,* 47 Cal.2d 304.[1]

This Court granted a stay of execution pending determination of the writ of certiorari. The petition for writ of certiorari was denied on February 25,

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[1]The portion of the opinion of the California Supreme Court discussing the facts in that case is printed as Appendix A to this brief. The affidavit of Warden Teets, filed in the California Supreme Court and a part of the record on certiorari to this Court, is printed as Appendix B to this brief for the convenience of the Court. These documents were before the California Supreme Court under the doctrine of judicial notice.

1957. *Caritativo v. California,* 561 Misc., October Term, 1956.

Thereafter, on May 7, 1957, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. On May 8, 1957, the California Supreme Court denied the petition without opinion. On May 22, 1957, petitioner filed a petition for writ of habeas corpus in the United States District Court and obtained a stay of execution. See *Caritativo v. Teets,* No. 36471 in the files of said District Court. Said Court discharged the order to show cause on the grounds that petitioner had not exhausted his State remedies by filing a petition for writ of certiorari.

Petitioner then filed a petition for writ of certiorari to review the California Supreme Court's denial of the petition for writ of habeas corpus.

STATEMENT OF FACTS.

In paragraph V of his petition for writ of mandate filed in the Marin County Superior Court, it was alleged on behalf of Caritativo that he was insane and summarized certain dreams which he had of a religious nature and it was the opinion of petitioner's counsel and an associated psychiatrist that Caritativo was presently insane. It was further alleged in this paragraph on behalf of the petitioner that petitioner was examined by a committee of three psychiatrists who reported to the warden that despite his dreams or visions, he was sane. It was also alleged that the

warden, relying upon the opinion of these three psychiatrists, had exercised his discretion and refused to certify that there was good reason to believe Caritativo to be insane.

In support of the motion to dismiss filed in the case of *People v. Caritativo*, reported as 47 Cal.2d 304, the warden of the prison submitted an affidavit which shows that periodically he had Caritativo examined as to his sanity (see Appendix B). The affidavit further shows that on four occasions the warden was advised that Caritativo was not insane, the last of these occasions being on August 7, 1956. The affidavit further discloses that George T. Davis, attorney for Caritativo, who filed these proceedings on his behalf, was advised as early as April 24, 1956, that the warden had been advised that Caritativo was sane and that he, the warden, would rely on the advice of the members of his staff as to the mental condition of Caritativo.

On September 1, 1957, Harley O. Teets, Warden of the California State Prison at San Quentin, died; thereafter Fred R. Dickson was duly appointed and is presently Warden of the California State Prison at San Quentin.

As indicated by the affidavit of Fred R. Dickson (Appendix C), it is the established procedure that in every death penalty case the warden requests a report of a neuropsychiatric committee within 60 days after the condemned inmate is received in the prison; that thereafter psychiatric reports are requested by the warden, depending upon the facts of the particular

case; however, in all cases, the warden requests a report from his psychiatric staff within 20 days of a scheduled execution. As recently as February 14, 1958, he has been advised in a report by three members of his medical-psychiatric staff that petitioner Caritativo is sane. See affidavit of Fred R. Dickson printed as Appendix C hereto.

Warden Dickson has no reason to believe that Caritativo is presently insane. Warden Dickson intends to follow the statutes of California and to institute proceedings to determine Caritativo's sanity pursuant to section 3701 of the Penal Code, if and when he has "good reason to believe" Caritativo is insane.

Petitioner alleges that he is presently insane and that the warden has good reason to believe that he is insane, and the warden has failed to institute proceedings pursuant to Section 3701 of the Penal Code to determine his sanity.

ARGUMENT.

I.

THIS COURT HAS JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF THE CALIFORNIA PROCEDURE FOR DETERMINING THE SANITY OF A CONDEMNED INMATE: THE QUESTION IS NOT MOOT.

The question of mootness immediately suggests itself in the present case. Harley O. Teets was Warden of the California State Prison at San Quentin at the time all of the proceedings with which we are concerned were instituted in the California Supreme

Court and at the time the petition for writ of certiorari was filed in this Court. However, on September 1, 1957, Warden Harley O. Teets died. On September 4, 1957, Fred R. Dickson was appointed and is presently the Warden of the California State Prison at San Quentin and has in his custody petitioner Caritativo.

It is the respondent's view that the present case is not moot. A real controversy exists between the parties. The question of the constitutionality of the California procedure remains at issue between the parties.

The petition for writ of habeas corpus filed in the California Supreme Court sought to compel Warden Teets to initiate proceedings to determine petitioner's sanity. This petition was denied.' Petitioner had previously sought a writ of mandate to compel Warden Teets to initiate proceedings to determine his sanity. The denial of the petition for writ of habeas corpus obviously followed the rule in the mandate action, *Caritativo v. Teets*, 47 Cal.2d 304. That decision expressly overruled the prior California cases in which the writ of mandate was used to review the warden's determination.

The question of the constitutionality of the California procedure remains regardless of the personal identity of the Warden of the California State Prison at San Quentin.

Furthermore, an actual controversy exists between the petitioner and the present warden, Fred R. Dickson. In support of the respondent's view that there

is an existing controversy and the case is not moot, Warden Dickson's affidavit is printed as Appendix C to this brief. As shown by Warden Dickson's affidavit, he had reviewed the prior psychiatric reports made to Warden Teets, and he has recently been advised by his medical-psychiatric staff that Caritativo is sane. Likewise, his personal observation supports the conclusion of the psychiatrists that Caritativo is sane, and he believes Caritativo is sane. The affidavit also establishes that Warden Dickson intends to follow the statutes of California and to institute proceedings to determine Caritativo's sanity pursuant to section 3701 of the California Penal Code, if and when he "has good reason to believe" Caritativo is insane.

Thus, an actual controversy continues to exist between the parties as to the present sanity of Caritativo. Also, the question remains whether or not California must provide a judicial review of the warden's determination that he "has no reason to believe" Caritativo is insane, or in the alternative, provide for an adversary hearing before the warden or other official to determine whether a condemned inmate is sane.

II.

THE CALIFORNIA PROCEDURE WHICH PROVIDES NO JUDICIAL REVIEW OF THE WARDEN'S DETERMINATION OF A CONDEMNED INMATE'S SANITY IS CONSTITUTIONAL.

A. The granting of reprieves for the reason that a condemned inmate has become insane is a matter of grace and not a requirement of due process.

Petitioner Caritativo asserts that he is presently insane and therefore not subject to execution under California law. Caritativo also alleges that the warden of San Quentin Prison had reason to believe that Caritativo is presently insane and that he refused to institute proceedings to determine his present sanity in accordance with section 3701 of the California Penal Code; that as a result he was denied due process of law.

California Penal Code section 3700 provides that no court, judge or officer, other than the Governor, can suspend the execution of a judgment of death except the warden of the state prison in certain situations. Section 3701 of the California Penal Code provides that if, after the delivery of a condemned inmate to the warden for execution there is good reason to believe that he had become insane, the warden must institute proceedings to determine his sanity. There is no judicial review of the warden's determination of petitioner's sanity. See *Caritativo v. Teets*, 47 Cal. 2d 304.

Likewise, Article VII of the California Constitution empowers the governor to grant reprieves, pardons and commutations of sentences. At common law the present insanity of a condemned inmate was a

legal cause of reprieve. This power was apparently exercised by the judiciary. See 2 Cooley's Blackstone 1524 (4th ed.). Indeed, Blackstone, in book 4 at page 396, concludes his discussion of reprieves for reason of insanity, with the following statement: ". ... And if he appears to be insane, the judge in his *discretion* may and ought to reprieve him" [Emphasis added]. Thus, where a suggestion of the insanity of a condemned person was made at common law after conviction and sentence, the judge was not required to proceed to summon a jury or to grant the reprieve, but he could take such action as in his discretion he deemed best. For discussion of the discretionary nature of the judicial reprieve at common law see *Nobles v. Georgia*, 168 U.S. 398, at 407-409.

However, both the United States and the California Constitutions have reposed the power to reprieve in the highest executive officer of the respective governments. See Article II, § 2, United States Constitution; Article VII, California Constitution. A similar provision is found in numerous other state constitutions. In both the United States and the California systems of government the power to reprieve is granted in the same breath as the power to pardon. The classification by the framers of the constitution of the power to reprieve with the power to commute and the power to pardon, is strong indication that the framers believed that the power to reprieve was a matter of grace. It is clear that they felt that the power to reprieve was related to the power to pardon and should be placed in the executive branch of the

government. The decision by this Court in *Solesbee v. Balkcom*, 339 U.S. 9, at 12, recognizes the relationship between executive clemency and the power to reprieve. This Court in the *Solesbee* case at page 11, stated as follows:

> "Postponement of execution because of insanity bears a close affinity not to trial for a crime, but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to pardon".

It is submitted that due process does not limit the power given to the governor to grant reprieves.

The Legislature need not repose the power to suspend the execution of a sentence in any other officer or court. It may, however, as a matter of legislative policy grant to agencies other than the governor the power to reprieve, even though the legislature is not required to do so. In California in addition to the governor's constitutional power to grant reprieves, the Legislature has given to the warden the power to grant a reprieve in the case of an insane condemned inmate. This power is related to the governor's power to reprieve and pardon, and likewise need not be subjected to judicial review. This Court arrived at a similar conclusion in *Solesbee v. Balkcom*, 339 U.S. 9 at page 12, where the Court stated

> "The power of executive clemency in this country undoubtedly derived from the practice as it has existed in England. Such power has traditionally rested in governors and the President, although

some of that power is often delegated to agencies such as pardon or parole boards. Seldom if ever has this power of executive clemency been subjected to review by the courts."

B. Due process at most requires that the power to grant a reprieve to a condemned inmate who has become insane be reposed in some officer or tribunal; due process does not require a jury trial or other adversary hearing to determine the question; the procedure used in California affords due process.

It might be conceded that the "Anglo-American concept of ordered liberty" contemplates that the power to reprieve a condemned inmate who has become insane be placed in some officer or tribunal. This power to reprieve has been given to the governor of California by the Constitution of California (Article VII); likewise, the Constitution of the United States and the constitutions of most states repose the power to reprieve in the chief executive officer. In this respect ever since we have been an independent nation the method and source of the power to reprieve has differed from the common law, since the power to reprieve was also a judicial power at common law. Thus, the power to reprieve in California is reposed by the Constitution in the Governor and by statute is reposed in the warden.

Due process does not require a separation of the powers or the assignment of the power to reprieve to a judicial officer. Indeed, the United States and numerous state constitutions expressly place this

power in an executive officer. In view of the fact that the power to reprieve is already reposed in the governor, the legislature would not be required to enact any statutes or set up any procedures concerning the exercise of the power to reprieve on the ground that a condemned inmate has become insane, although in California the Legislature has in addition granted such power to the warden.

Indeed, the constitutional grant of the power to the governor warrants the legislature in denying judicial or other officers, except the warden, the right to suspend the execution of the sentence of a judgment of death. California, by section 3700 of the Penal Code, has denied all other officers, judicial or executive, the power to suspend a sentence with the exception of the Governor and the warden.

Due process does not control the exercise of the power to reprieve. The power being granted by constitutional provision to the highest executive officer implies that the chief executive officer shall exercise such power in any manner he sees fit, with or without a hearing.

This Court early recognized that the procedures used by the President in exercising his power to grant reprieves was a matter entirely within his discretion. See *Ex parte William Wells*, 59 U.S. 307, 314-315, where the Court by way of *dictum* asserted as follows:

> "That [the power to grant reprieves] is not only to be used to delay a judicial sentence when the

President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis,* as where a female after conviction is found to be *enceinte,* or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used, to determine either of the two just mentioned, are clearly within the President's power to direct; . . ."

If due process strikes down the provisions of the state constitution or requires that there be a judicial review or a specific type of proceeding to determine the question of sanity by the person exercising the power to reprieve, then like restraints exist upon the power of the President of the United States by virtue of the due process clause of the Fifth Amendment. Due process does not control the pardoning power of the governor, even though that power may involve the innocence of the accused. It is difficult to see how it can logically be maintained that it is a denial of due process not to afford an adversary hearing as to the sanity of a condemned inmate, and yet contend that it is not a denial of due process if a condemned person is not afforded an adversary hearing on the question of his innocence when application is made for pardon.

The power to reprieve is the power to suspend a judgment temporarily and the reasons for reprieve

are in no way related to the validity of the judgment. We must assume the petitioner has been constitutionally convicted. Whether or not to relieve the defendant from the consequences of the judgment duly imposed by law is purely a matter of grace.

It should also be noted that the American Law Institute in its Code of Criminal Procedure, June 15, 1930, has adopted a procedure very similar to the procedure set out in Penal Code sections 3700 and 3701. Likewise, numerous states have dispensed with formal judicial hearings upon the issue of the present sanity. Thus, if due process is tested by the current practice in many states, and the current thinking is indicated by the American Law Institute Code of Criminal Procedure, then there is no denial of due process.

As has already been noted at common law the tribunal charged with the responsibility of granting reprieves was vested with broad discretion in deciding whether evidence should be heard. Likewise, at common law, the tribunal was empowered to determine the procedure to be utilized; that tribunal in its discretion decided whether or not a jury should determine the question of sanity of the condemned inmate. Thus, measured by the standards followed by "judicial" exercise of the power to reprieve at common law, there is no denial of due process by the procedure utilized in California. Indeed, the procedure used in California is not a denial of due process unless there be some distinction between the exercise of a power

by a judicial tribunal and the exercise of the identical power by an executive tribunal.

In California Caritativo may in a sense "review" the determination of the warden. If he is unsatisfied with the warden's determination he may always request the governor to exercise his constitutional power to grant reprieves pursuant to Article VII of the California Constitution. In California the Governor has a secretary whose primary responsibility is to pass upon requests for reprieves, pardons, commutations and extraditions. The Governor's office is always open to the suggestion that a reprieve ought to be granted in a particular case.

The procedure provided in California is a most logical procedure. Only the warden is in a position to determine immediately prior to an execution, the sanity of the condemned person. Since sanity is an ever-changing status, any adjudication by a judicial officer, a jury or other executive officer, would not be final unless a prisoner were executed immediately after determination of his sanity. However, not even in that case could we be certain that the person was sane at the time of the execution, since the person may have become insane while the jury or judicial officer was deliberating the question of his sanity. Indeed, the most logical and competent person to make the determination is the warden, who is charged with executing the judgment. The warden personally observes the sanity of the inmate and likewise obtains additional information from the observations by other

members of his staff, including reports filed by his psychiatric staff. In the present case both the personal observations of the warden and the observations of his psychiatric staff are that the petitioner Caritativo is and was sane.

Judicial review of the determination by the warden serves no purpose except to stifle the administration of justice. As was pointed out in *Solesbee v. Balkcom*, 339 U.S. 9, at 12:

> ". . . As was pointed out in the *Nobles* case [168 U.S. 398], to require judicial review every time a convicted defendant suggested insanity would make the possibility of carrying out a sentence depend upon 'fecundity in making suggestion after suggestion of insanity.' (Citing cases.) To protect itself society must have power to try, convict, and execute sentences."

The wisdom and foresight of this Court in both the *Solesbee* and *Nobles* decisions concerning the possibility of great delay in executing sentences is borne out by the record in the present case. In the present case a considerable period of time expired between the date of the judgment and the date when the petitioner first sought to compel the warden to initiate proceedings to determine petitioner's sanity by petition for writ of mandate. Furthermore, it should be noted that it was on August 30, 1956, *one* day prior to the date fixed for the execution that petitioner first filed a petition for writ of mandate which sought to compel the warden to initiate proceedings to deter-

mine his sanity. The delays in executing sentences which concerned this Court in the *Solesbee* and *Nobles* decisions are an existing reality.

III.

NO CONSTITUTIONAL QUESTION IS RAISED BY THE STATE PROCEDURAL RULE WHICH REQUIRES THE ENTRY OF A PLEA OF NOT GUILTY BY REASON OF INSANITY BY THE DEFENDANT BEFORE COMMENCEMENT OF THE TRIAL.

Appellant contends he was denied due process of law because after the verdict of guilty and before the verdict was entered he sought to enter a plea of not guilty by reason of insanity. The petition for writ of habeas corpus correctly recites that petitioner was represented in the early stages of the trial by different counsel and that at that time only a plea of not guilty was entered. The defendant, by failure to enter at the proper time the plea of not guilty by reason of insanity waived the right to enter such plea. The state statute requires the entry of plea before trial. Penal Code § 1016. The defendant was represented by counsel and failed to enter such plea. This failure results in a waiver of the right to enter the plea. Likewise, a reading of the opinion of the California Supreme Court, *People v. Caritativo*, 46 Cal.2d 68, reveals that this question was not discussed by the California Supreme Court. By his failure to raise this matter on appeal he has waived the contention since habeas corpus cannot do service as an appeal.

The application by the State Courts of these fundamental procedural rules is not a denial of due process. See *Brown v. Allen*, 334 U.S. 443, at 486, 503.

Dated, San Francisco, California,
April 1, 1958.

Respectfully submitted,

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(Appendices A, B and C Follow.)